No. 14982

United States Court of Appeals

For the Ninth Circuit

R. P. Hill and Mary Hill, *Appellants,*

vs.

A. E. Waxberg, doing business as Waxberg Construction Company, *Appellee.*

Appeal from the District Court for the District of Alaska, Fourth Division

APPELLANTS' REPLY BRIEF

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Seattle 4, Washington.

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Attorneys for Appellants.

The Argus Press, Seattle

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ARGUMENT

. The Evidence Was Insufficient to Establish a Case for the Jury.

The respondent has largely ignored that portion of he respondent's testimony which explains his reason r purpose in devoting his time to the preliminary de- ails of the construction project. The respondent's estimony establishes that he was not interested in just eeing that an FHA commitment was issued (Tr. 125, 44, 145, 146). He was interested in the issuance of a ommitment, based upon plans and specifications, that ould insure a profit for the building contractor. The espondent testified as follows (Tr. 126):

> "That's right. That is the reason I spent all this time to see that we get a building the specifications and so forth that, so that I could make a reasonable profit."

This is understandable. Any contractor devotes certai time and effort to insure that if he undertakes a cor struction project he will make a profit. However, suc activities are not for the benefit of the owner, but in stead are primarily for the contractor's own benefi Such is the case here.

The instructions given by the trial court do not pre sent to the jury the issue of the respondent's intentio in carrying out these activities. Even though the re spondent's activities were intended primarily for hi own benefit, under the court's instructions, if there wa any resulting benefit to appellants, the jury was per mitted to find against the appellants to the extent o such benefit. Appellants submit that this is not a cor rect interpretation of the law. See Annotation, Implie Agreement Repelled, 54 A.L.R. 548 and the decision therein cited. Appellants' requested instructions woul have properly submitted the issue of the respondent's intent to the jury.

The decisions of *Estate of Walton,* 213 Ia. 104, 23 N.W. 577 (1931) and *City Ice & Fuel Co. v. Bright,* Cir. 1934, 73 F.(2d) 461, cited by respondent, state only that where services are performed for another, under circumstances where it should be known that compensations is expected, a promise to pay will be implied. The services performed here were rendered primarily for the respondent's own benefit and not "for another."

The appellants have no quarrel with the language quoted by the respondent from the decision of *Pierson v. Pierson,* 63 Ida. 1, 115 P.(2d) 742 (1941), stating that where one party renders it impossible for the other

o perform the contract the latter may recover in *quan-um meruit* for services rendered up to the time of the reach. However, the theory set forth in this quotation vas not submitted by the trial court to the jury. Instead he jury was instructed that if both parties were at ault the respondent was entitled to recover. See Willis-on, Contracts (1937). §1482 and Restatement of Con-racts (1932) §357, stating that recovery in *quantum neruit* would be denied where the plaintiff's breach of ontract was wilful or deliberate.

I. The Verdict of the Jury Was Excessive in Amount.

The respondent has attempted to justify the amount f the jury verdict, and on page 7 of its brief, the re-pondent adds certain figures in this connection. The rst figure is $4300.00 and represents the respondent's estimony as to the "value" of his services. The re-pondent testified that he spent forty-three days on the roject and that his services were valued at one hun-red dollars per day (Tr. 58). It cannot be disputed nat the great majority of the respondent's efforts were, ccording to his testimony, in connection with the pre-minary work of obtaining the FHA commitment (Tr. 3, 94, 105, 112, 113, 119, 123). Yet the respondent has lso included in his enumeration, mentioned above, the alue of $4800.00 assigned to the commitment by the nly witness giving testimony on this point. The dupli-ation is obvious.

The measure of damages under the trial court's in-tructions was the amount of benefit received by the ppellants as a result of the respondent's services and xpenditures. The respondent is not entitled to be com-ensated on a daily basis for his time and then add to

This is understandable. Any contractor devotes certain time and effort to insure that if he undertakes a construction project he will make a profit. However, such activities are not for the benefit of the owner, but instead are primarily for the contractor's own benefit. Such is the case here.

The instructions given by the trial court do not present to the jury the issue of the respondent's intention in carrying out these activities. Even though the respondent's activities were intended primarily for his own benefit, under the court's instructions, if there was any resulting benefit to appellants, the jury was permitted to find against the appellants to the extent of such benefit. Appellants submit that this is not a correct interpretation of the law. See Annotation, Implied Agreement Repelled, 54 A.L.R. 548 and the decisions therein cited. Appellants' requested instructions would have properly submitted the issue of the respondent's intent to the jury.

The decisions of *Estate of Walton,* 213 Ia. 104, 238 N.W. 577 (1931) and *City Ice & Fuel Co. v. Bright,* 6 Cir. 1934, 73 F.(2d) 461, cited by respondent, state only that where services are performed for another, under circumstances where it should be known that compensations is expected, a promise to pay will be implied. The services performed here were rendered primarily for the respondent's own benefit and not "for another."

The appellants have no quarrel with the language quoted by the respondent from the decision of *Pierson v. Pierson,* 63 Ida. 1, 115 P.(2d) 742 (1941), stating that where one party renders it impossible for the other

to perform the contract the latter may recover in *quantum meruit* for services rendered up to the time of the breach. However, the theory set forth in this quotation was not submitted by the trial court to the jury. Instead the jury was instructed that if both parties were at fault the respondent was entitled to recover. See Williston, Contracts (1937). §1482 and Restatement of Contracts (1932) §357, stating that recovery in *quantum meruit* would be denied where the plaintiff's breach of contract was wilful or deliberate.

II. The Verdict of the Jury Was Excessive in Amount.

The respondent has attempted to justify the amount of the jury verdict, and on page 7 of its brief, the respondent adds certain figures in this connection. The first figure is $4300.00 and represents the respondent's testimony as to the "value" of his services. The respondent testified that he spent forty-three days on the project and that his services were valued at one hundred dollars per day (Tr. 58). It cannot be disputed that the great majority of the respondent's efforts were, according to his testimony, in connection with the preliminary work of obtaining the FHA commitment (Tr. 73, 94, 105, 112, 113, 119, 123). Yet the respondent has also included in his enumeration, mentioned above, the value of $4800.00 assigned to the commitment by the only witness giving testimony on this point. The duplication is obvious.

The measure of damages under the trial court's instructions was the amount of benefit received by the appellants as a result of the respondent's services and expenditures. The respondent is not entitled to be compensated on a daily basis for his time and then add to

that figure the net benefit or value resulting to the appellants from the time so spent.

The respondent had the burden of establishing the value of the benefit which the appellants received by reason of the respondent's activities and expenditures. If the respondent's estimate as to the value of his services is accepted, the benefit to the appellants would total $4,300. The respondent failed to present evidence concerning the benefit or value to the appellant of the respondent's expenses, and consequently, he failed to sustain the burden of proof with respect to this item.

The respondent testified that he performed services preliminary in obtaining the FHA commitment (Tr. 50). He also testified that the appellant, Mr. Hill, worked to obtain the commitment (Tr. 59), and that the appellant hired a firm of architects to prepare the plans and specifications for submission with the application for the commitment (Tr. 46). However, even if the full value of the commitment were assumed to result from the respondent's efforts and expenditures, its value could not be added to the figure which the respondent gave as the value of his services. The verdict of the jury was clearly excessive in amount.

Respectfully submitted,

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